LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
JUL 26 1973
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1973

No. 73-179

ESTYNE WEST,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT IN CRIMINAL ACTION

PAUL P. RAO, JR.,
Attorney for Petitioner,
233 Broadway,
New York, N. Y. 10007.

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions, Statutes and Rules Involved	5
Statement of Facts	5
Reasons for Granting the Writ	10
Arguments on Question I	10
Arguments on Question II	16
Arguments on Question III	25
Conclusion	27
Appendix:	
Amendment IV—Searches and Seizures	A1
Amendment VI: Jury trial for crimes, and procedural rights	A1
Title 21, U. S. Code	A2
Rule 52: Harmless Error and Plain Error	A13

Cases Cited

Agnello v. United States, 269 U. S. 20, 46 S. Ct. 4	17, 18
Berger v. United States, 295 U. S. 78 (1935)	16, 27
Brady v. Maryland, 373 U. S. 83, 83 S. Ct. 1194	12

PAGE

California Insurance Co. v. Allen, 235 F. 2d 178 (5th Cir. 1956) 17

Chapman v. California, 386 U. S. 18, 87 S. Ct. 824 ... 13, 16

Courtney v. United States, 390 F. 2d 521 (9th Cir. 1968) 17, 19, 22

Fahy v. Connecticut, 375 U. S. 85, 84 S. Ct. 229 (1963) 17

Giglio v. United States, 92 S. Ct. 763 (1972) 2, 10, 12, 16

Henderson v. United States, 218 F. 2d 14 (6th Cir. 1955) 26

Krulewitch v. Untied States, 337 U. S. 440, 69 S. Ct. 716 25

Michelson v. United States, 335 U. S. 469 (1948), 69 S. Ct. 213 24

Mooney v. Holohan, 294 U. S. 103, 55 S. Ct. 340 12

Napue v. Illinois, 360 U. S. 264, 79 S. Ct. 1173 ..... 12, 13

Pyle v. Kansas, 317 U. S. 213, 63 S. Ct. 177 12

Quiles v. United States, 344 F. 2d 490 (9th Cir. 1965) 16

Shepard v. United States, 290 U. S. 96 20

Southwestern Publishing Co. v. Horsey, 230 F. 2d 319 (9th Cir. 1956) 15

Spencer v. Texas, 87 S. Ct. 648, 385 U. S. 554 (1967) 16

United States v. Apuzzo, 245 F. 2d 416 (2nd Cir. 1957) 17

United States v. Atkinson, 297 U. S. 157, 56 S. Ct. 391 26

PAGE

United States v. Beno, 324 F. 2d 582 (2nd Cir. 1963) 18, 20, 21

United States v. Bozza, 365 F. 2d 206 (2nd Cir. 1966) 23

United States v. Cifarelli, 401 F. 2d 512 (2nd Cir. 1968) 22

United States v. Cuadrado, 413 F. 2d 633 (2nd Cir. 1969) 21

United States v. De Cicco, 435 F. 2d 478 (2nd Cir. 1970) 24

United States v. De Fillo, 257 F. 2d 835 (2nd Cir. 1958) 27

United States v. Dutsch, 357 F. 2d 331 (4th Cir. 1966) 15

United States v. Giuliano, 348 F. 2d 217 (2nd Cir. 1965) 12

United States v. Gruenberger, 431 F. 2d 1063 (2nd Cir. 1970) 27

United States v. Hiss, 185 F. 2d 882 (2nd Cir. 1950) 23

United States v. Hysohion, 439 F. 2d 274 (2nd Cir. 1971) 27

United States v. James, 208 F. 2d 124 (2nd Cir. 1953) 24

United States v. Johnson, 208 F. 2d 404 (2nd Cir. 1953) 23

United States v. Johnson, 382 F. 2d 280 (2nd Cir. 1967) 24

United States v. Jones, 374 F. 2d 414 (2nd Cir. 1967) 14

United States v. Kahaner, 317 F. 2d 459 (2nd Cir. 1963) 21

PAGE

United States v. Keogh, 391 F. 2d 138 (2nd Cir. 1968) 12

United States v. Knohl, 379 F. 2d 427 (2nd Cir. 1967) 22

United States v. Ravich, 421 F. 2d 1196 (2nd Cir. 1970) 13, 14

United States v. Sawyer, 469 F. 2d 450 (2nd Cir. 1972) 13

United States v. Semensohn, 421 F. 2d 1206 (2nd Cir. 1970) 16

United States v. Smith, 283 F. 2d 760 (2nd Cir. 1960) 21

United States v. Socony Vacuum Oil Co., 310 U. S. 150, 60 S. Ct. 811 26

United States v. Spangelet, 258 F. 2d 338 (2nd Cir. 1958) 27

United States v. Tomaiolo, 249 F. 2d 683 (2nd Cir. 1957) 24

United States v. White, 401 U. S. 745, 91 S. Ct. 1122 (1971) 4, 25

United States v. Winston, 447 F. 2d 1236 (D. C. Cir. 1971) 17, 19

Walder v. United States, 347 U. S. 62, 74 S. Ct. 354 (1954) 18

Authorities Cited

C. J. S. Evidence, Sec. 159, p. 433 14

6J Wigmore Evidence, Sec. 1808 at 276-279 (3rd Ed. 1940) 13

Supreme Court of the United States

OCTOBER TERM, 1973

No. .....

ESTYNE WEST,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT IN CRIMINAL ACTION

Petitioner Estyne West prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit affirming her judgment of conviction after a jury trial in the Southern District of New York on a one-count indictment under Title 21 U. S. C. Sections 812, 841(a)(1) and 841(b)(1)A, possessing 11.9 grams of cocaine with intent to distribute.

Opinions Below

There was no formal opinion by District Judge Marvin E. Frankel and judgment of conviction was affirmed from the bench without opinion by the United States Court of Appeals for the Second Circuit.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit, affirming the judgment of conviction of appellant, was entered on June 27, 1973. This petition for certiorari was filed less than thirty (30) days from the date aforesaid. The jurisdiction of this writ is invoked under 28 U. S. C. 1254 (1).

Questions Presented

1. The government's chief witness, Special Agent Hall of the Bureau of Narcotics and Dangerous Drugs, in the proffering of Exhibit 3C, 44 grams of a white powder, falsely identified it as cocaine, in the clear view and hearing of the jury. This testimony was stricken and immediately thereafter, when the agent testified he could not identify his blurred initials on the exhibit, it was held inadmissible. Subsequently, in summation, the prosecutor was permitted over objection to refer to this exhibit by stating that it would have been in evidence if Agent Hall had been less than honest and identified his blurred initials. Significantly, however, seven and one-half months prior to the trial, the governmental laboratory report stated that the above Exhibit 3C was a non-narcotic, non-controlled substance, and that it had in fact been initialed by Agents Shay and Diez, who had delivered it to the government chemist. Under these circumstances, the question is:

Considering the standards set forth in *Giglio* v. *United States*, 92 S. Ct. 763 (1972), was there irreparable prejudicial error denying the defendant her Sixth Amendment right to a fair trial in that Narcotics Agent Hall falsely identified a bag of white powder as cocaine, which ostensibly was inadmissible because Hall's initials were blurred, which false testimony, although stricken, was irresponsibly left

uncorrected, since the factual deception practiced upon the court and jury prevented the court from pointedly ruling *ab initio* and misled the jury in its deliberations, especially when this misrepresentation was compounded in summation by the government being permitted over objection to attest to the honesty of the agent as it related to the validity of this bag of white powder being cocaine.

2. In the government's case in chief, Narcotics Agent Hall, located outside the closed door of defendant's apartment, testified that as he listened he overheard the word cocaine several times mentioned through the door in a conversation between the defendant and one Sheldon Bloom, who died prior to trial. On direct examination, the defendant denied any discussions with Bloom as to cocaine. On cross-examination, the prosecutor, over objection, was permitted for purposes of eliciting possible contradiction for future rebuttal to ask whether the defendant discussed with Bloom that night a certain alleged South American cocaine-sugar swindle perpetrated upon Bloom. The defendant denied she had discussed this alleged swindle with Bloom that evening. Agent Hall was thereafter permitted to testify on rebuttal that the defendant had admitted to Hall himself approximately four hours subsequent to the arrest, about 5:30 A.M., an elaborate swindle perpetrated upon Bloom as to "smuggling" cocaine into the United States, which unbeknown to Bloom was in fact sugar. The agent, in testifying at length concerning this purported admission by the defendant, spiced the story with extraneous lurid details, among which he mentioned that a person to whom Bloom was introduced by defendant was a "federal fugitive" and that the defendant had met a partner of Bloom's, adding that the partner had his "homosexual lover, a young boy" with him. Under these circumstances, there are two questions:

a) Considering the fact that during deliberation the jury specifically asked that the rebuttal testimony be read back to it, was it substantial error, denying the defendant her Sixth Amendment constitutional right to be tried on the specific charge of the indictment, to have permitted, over objection and without cautioning the jury, the development at length of this highly inflammatory, extremely prejudicial and unrestrained rebuttal testimony, containing gratuitous, contemptible characterizations, especially when it was ostensibly permitted for the sole purpose of contradicting unrelated anticipated testimony of the defendant, but was in fact used as a blatant device and scheme to introduce an alleged prior criminal act.

b) Whether the defendant's constitutional right to privacy under the Fourth Amendment, as defined by *United States* v. *White*, 91 S. Ct. 1122, 401 U. S. 745, was violated in that Agent Hall testified as to what he had overheard behind the closed door of the defendant's apartment while he surreptitiously listened without the consent of either party and without a court order; which very testimony necessitated the defendant's denial, led to the improper cross-examination and resulted in the prejudicial rebuttal.

3. Whether in the summation of the prosecution the statement that the deceased Sheldon Bloom, who in fact was the only witness to the alleged crime charged and the purported victim of the alleged cocaine-sugar swindle, "might have been the key government witness", went irretrievably beyond the limits of fair comment so as to prejudice the defendant's right to a fair trial, notwithstanding the fact that the court cautioned the jury not to speculate on what Bloom might or might not have been, as this was a patently unfair and prejudicial bolstering of the government's case by making inferences not based on the evidence and making statements of the government's own

personal knowledge, as is further evidenced by the fact that the government, in summation, coupled the charge in the indictment with the rebuttal testimony by stating, "she was not only a dope peddler, she was a swindler".

Constitutional Provisions, Statutes and Rules Involved

This case involves the Fourth and Sixth Amendments to the Constitution of the United States, Title 21 U. S. C., Sections 812, 841(a)(1) and 841(b)(1)A and Rule 52B of the Federal Rules of Criminal Procedure. The texts are printed in the appendix to this petition on pp. A1-A13.

Statement of Facts

The defendant was charged with a one-count violation of Title 21 U. S. C., Sections 812, 841(a)(1) and 841(b)(1)A, possession of 11.9 grams of cocaine with intent to distribute. The trial began on October 30, 1972, was concluded on November 1st and the jury returned its verdict of guilty on November 2, 1972. Motions for judgment of acquittal and for a new trial were filed on February 13, 1973, there were affidavits in opposition by the government, a reply by movant, and the motions were denied on February 26, 1973.

The government called at trial Agent Jeffrey Hall of the Bureau of Narcotics and Dangerous Drugs, who testified that on March 6, 1972, he, together with other agents, went to the defendant's apartment building at approximately 8 P.M. Several agents positioned themselves outside the building and several inside the building. Agent Hall testified that while listening at the defendant's closed apartment door he could hear the word "cocaine" mentioned "several times by both the male (Sheldon Bloom)

and Miss West" (Tr. 29). At approximately 1:35 A.M., at a given signal, two agents climbed up a ladder and entered the defendant's apartment through a window. One of the agents then let Agent Hall into defendant's apartment some moments later. In the apartment were the defendant and Sheldon Bloom who subsequently died prior to trial. Agent Hall testified that the defendant voluntarily gave him two bags of white powder later identified and placed in evidence as a non-controlled substance, benzocaine. Hall further testified that four hours later, at approximately 5:30 A.M., the defendant had allegedly admitted at the Regional Office, where she was detained without counsel, that she had thrown cocaine out of the window, that it was pure cocaine and that she could help the Bureau to apprehend others with larger quantities (Tr. 67).

During direct examination, Agent Hall was shown Exhibits 3A, 3B and 3C marked for identification and asked if he could identify them. Hall answered, "Yes sir, I can. Exhibit 3A is the locked sealed envelope in which the cocaine, Exhibit 3C, was submitted to the Bureau of Narcotics and Dangerous Drugs chemist and the reason I know this . . ." (Tr. 78). There was an objection and the court ruled, "Well at this time I will strike out this description of that substance and of course, if the government is not able to eventually adduce any evidence that indicates something or other about that description, that will end the case. But we will strike it out now and the jury will disregard it" (Tr. 79). Most significantly, however, the affidavit of the prosecutor in opposition to the motion for a new trial admitted that a lab report seven and one-half months prior to trial stated that this very substance was in fact known to be non-controlled non-narcotic benzocaine.

The government then again asked, "Can you identify Government's Exhibit 3C" and Agent Hall testified, "I

initialed it up here but it is faded" and the court stated, "Strike it out." Agent Hall said he could not identify it. The above-mentioned laboratory report in fact stated that two other agents had initialed this exhibit.

Then in summation the prosecutor again referred to Exhibit 3C by stating, "Do you remember when he (Hall) was on the witness stand I had a bag of white powder and I asked him to take a look at the bag of white powder and see if he could identify it. He was looking at the bag of powder looking for his initials on it. He said 'I think these are my initials but they are blurred and I can't say whether they are or not.' The government didn't offer that bag of white powder. He could have said sure, these are my initials, they are blurred and I can identify it and get it into evidence, but he didn't do that" (Tr. 404-405). There was an objection and the court stated, "What transpired is subject to the jury's recollection, it transpired in open court. I will allow counsel to argue about that" (Tr. 405).

Agent Diez of the Federal Bureau of Narcotics testified he was on the street below the apartment of the defendant while Agents Korniloff and Magno were climbing the ladder into the apartment, and that he saw a small article come out of the window of the apartment and land at his feet. The article was a glass, which shattered. Diez picked it up. It contained within it a small clear plastic bag of white powder. This was later received in evidence as the 11.9 grams of cocaine, and this small quantum was the only cocaine received in evidence. Agent Korniloff then testified that, when he climbed the ladder into the window, with gun in hand, he saw defendant get up from the couch and throw something transparent out of a window and then allegedly heard the defendant say to Bloom,

"They can't do anything now." Agent Magno testified he subsequently climbed into the apartment and placed the defendant under arrest.

The defendant called Mrs. Evelyn Kramer, who testified as to the physical layout of the apartment. Joel West, defendant's husband, testified that the Bureau of Narcotics and Dangerous Drugs was using a process he developed and that the benzocaine was his for purposes of experimentation. The defendant herself testified and denied any conversation with Bloom in her apartment about cocaine, denied throwing anything out of the window and denied making any admissions to Agent Hall, but stated that Bloom had been in her apartment to discuss her proposal for his investing in an African opera company in which she and her husband had an interest (Tr. 313-333).

On cross-examination of the defendant, the prosecutor was permitted to ask, "Did you discuss South America in any way?" (Tr. 336), to which a negative reply was given and over objection the prosecutor further asked, "Was there any discussion of a scheme to bring in a large alleged quantity of cocaine from South America during that conversation?" (Tr. 338). A side-bar conference was held and the prosecutor stated he was going to put Agent Hall back on the stand to testify that the defendant had told him about such a South American scheme (Tr. 338). After the inquiry by the court as to why this was not brought out on the government's direct case, the prosecutor said, "At the time I didn't know whether she was going to testify to it. I feel that it is a proper matter for rebuttal if she would deny this conversation" (Tr. 339). The question was permitted, then, on the issue of discrediting the defendant by way of contradiction (Tr. 340 and 352) and for purposes of future rebuttal as to this alleged conversation with Bloom as to the South American scheme, and the defendant categorically denied it (Tr. 340).

Agent Hall was then recalled for puposes of rebuttal on this issue and permitted over objection to answer the question, "Will you tell the court and jury what she said to you about her conversation with Sheldon Bloom?" (Tr. 348) and Agent Hall said, "She told me that the primary purpose of her meeting with Mr. Bloom that evening was to discuss a swindle that she had perpetrated on Mr. Bloom and a partner of his in the Sanctuary Night Club (Tr. 350).

"She told me that she swindled them out of $10,000 with a trip down to South America that they had backed her on, with a phony cocaine transaction. She promised them that they would invest a certain amount of money and she would like multiply it by ten times and I believe she told me that they fronted her, advanced her $5,000, she told me Mr. Bloom went down to South America, she also went to South America.

"She arranged for an introduction between Mr. Bloom and a Maria Lasso, a Spanish woman and her husband, who was a federal fugitive, for an introduction between Mr. Bloom and Maria Lasso.

"She met Mr. Bloom's partner in the Bahamas . . ."

After another objection and after the court stated at the side-bar conference that the testimony was being admitted for the purpose of discrediting defendant's story of what she and Bloom discussed (Tr. 352-353), Agent Hall continued, "Yes sir. She further told me that she met with a man by the name of Seymour, I don't know his last name. He was the co-owner she told me, of the Sanctuary nightclub in Manhattan, a partner of Mr. Bloom's. She had met Seymour and his homosexual lover, a young boy, somewhere in the Bahamas. I believe she said the Bahamas and at that point she had them help her tape, I think she said, a certain large quantity, 5 kilos of sugar,

not cocaine, but sugar on to her body, and she had them believing that it was cocaine and she was going to smuggle it into the United States.

"At the time she met Mr. Bloom in the apartment she told me that she was like holding out for more money and had told him she had stashed the cocaine somewhere else.

"This is what she believed, why we were at her apartment, to seize this cocaine in the swindle she had. She told me several other people was expecting this cocaine to be coming in and this was the reason, she told me, that she met with Bloom that night at her apartment" (Tr. 353-354).

In the summation, the prosecutor, besides his statements concerning Agent Hall and the white bag of powder mentioned above, also stated about Sheldon Bloom, the deceased, that "He might have been the key government witness". There was an objection and the court stated, "The jury will disregard that remark. They are not to speculate about what dead people might or might not have been" (Tr. 403). Further in summation, the prosecutor said, "She was not only a dope peddler, she was a swindler."

Reasons for Granting the Writ

Arguments on Question I:

The Court of Appeals for the Second Circuit has decided a federal question of substance contrary to the applicable decisions of this court as set forth in *Giglio* v. *United States,* 92 S. Ct. 763 (1972), in that it affirmed the government's use of falsely identified and highly prejudicial evidence bearing on a material issue which, standing uncorrected, misled the trial court in its rulings and deceived the jury in its deliberations. The affirmance of a conviction

of a defendant and potential imprisonment based on such a contrivance is incompatible with the rudimentary demands of justice and demands the intervention of this court.

At the trial, when Agent Hall was shown Government Exhibit 3C for purposes of identification, he testified that it was cocaine (Tr. 78). There was an objection and Hall stated he was unable to identify his initials on Exhibit 3C which was therefore never placed in evidence. It is significant that this falsely identified exhibit, a white powder contained in a plastic bag, which was displayed to the jury, contained 44 grams of benzocaine, about four times the size of the 11.9 grams of cocaine which the defendant was charged in the indictment with distributing. Moreover, the governmental lab report dated March 17, 1972, identified it as a non-controlled substance. The government, then, either knew or should have known seven and one-half months prior to trial and the case agent, Mr. Hall, either knew or should have known seven and one-half months prior to trial that Agent Hall's characterization of this very substance as "cocaine" was false.

Moreover, the government received additional impact out of the presentation of Exhibit 3C, for when Hall was again asked to identify the exhibit, he said he could not identify his blurred initials. However, the laboratory report regarding the initials stated to the contrary, to wit, that Agents Diez and Shay had initialed it (Tr. 79). Thereafter, on summation the prosecutor specifically referred on four occasions to this "bag of white powder", mentioning that it would have been in evidence if the agent had chosen to lie and identify his blurred initials. Since this bag of white powder had been identified as cocaine, the prosecutor paraded its validity as cocaine and the agent's credibility as to his testimony that this bag of white powder was in fact cocaine. When an objection was made by defense

counsel to these statements in summation by the government, "I ask Your Honor to have the jury disregard any statement about anything not put into evidence", the trial court, instead of sustaining the objection, gave credence to the government's remarks by stating, "What transpired is subject to the jury's recollection, it transpired in open court. I will allow counsel to argue about that." Obviously, the court was not aware that the substance was not cocaine and the government had the full responsibility to so inform the court and jury. The court could not pointedly rule on the objection without knowing the true facts. Yet this deception practiced upon the court and jury by the falsely identified substance was left uncorrected by the government. *United States* v. *Giuliano,* 348 F. 2d 217 (2nd Cir. 1965). Whether this presentation of false evidence was made knowingly, *Mooney* v. *Holohan,* 294 U. S. 103, 55 S. Ct. 340, *Pyle* v. *Kansas,* 317 U. S. 213, 63 S. Ct. 177, or whether the prosecuting attorney allowed it to go uncorrected, *Napue* v. *Illinois,* 360 U. S. 264, 79 S. Ct. 1173, is not controlling. For "irrespective of the good faith or bad faith of the prosecution", *Brady* v. *Maryland,* 373 U. S. 83, 83 S. Ct. 1194, a new trial is justified. Moreover, since Agent Hall was the major government witness, here the "reliability of a given witness may well be determinative of guilt or innocence", *Napue, supra,* at 269, 79 S. Ct. at 1177, and was likely to have changed the verdict. *United States* v. *Keogh,* 391 F. 2d 138, 148 (2nd Cir. 1968). *A fortiori,* a new trial is required since obviously "the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury", *Napue, supra,* at 271, 79 S. Ct. at 1178. Whether this false testimony "was the result of design or negligence, it is the responsibility of the prosecutor", *Giglio* v. *United States,* 92 S. Ct. 763 (1972). Here there was not only negligence but it was culpable negligence showing a reckless disregard for the

truth, especially when Hall's reliability was indispensable to the government's case. As the court said in *Napue, ibid.*, at 1177:

> "The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend."

Thus, a highly prejudicial substance, identified as cocaine but which was known, or should have been known, to the government to be the uncontrolled non-narcotic substance benzocaine, was displayed to the jury, never placed in evidence, leading the jury to believe that the defendant trafficked in the drug possessing larger quantities (44 grams) of the drug rather than the 11.9 grams with which she was charged. The government revivified the prejudice created by this factual misrepresentation and compounded it by referring to the inadmissible falsely identified evidence in summation to erroneously proclaim the validity of the substance and the credibility of its agent's testimony. Quite evidently, the reference to this white bag of powder was improper since it was not in evidence and in fact all testimony had been stricken. 6J Wigmore Evidence, Sec. 1808 at 276-279 (3rd Ed. 1940). Here the prosecuting attorney "persisted in reference to" it and the subject was not "wholly dropped". *United States* v. *Sawyer,* 469 F. 2d 450, 452 (2nd Cir. 1972). Thus, this error indeed affected the substantial rights of the defendant and was not "harmless beyond a reasonable doubt". *Chapman* v. *California,* 386 U. S. 18, 24, 87 S. Ct. 824, 828.

As to this proffering of inadmissible physical evidence, the displaying of this bag of white powder falsely identified as cocaine, the Circuit Court in *United States* v. *Ravich,* 421 F. 2d 1196 (2nd Cir. 1970) at p. 1204, even as to the

presence in the courtroom of physical evidence which was not even, as in this case, falsely identified, stated:

> "If the physical evidence was offered only to prove that defendants were the sort of persons who carried guns, and therefore were more likely than most to have committed an armed robbery, it might run afoul of the familiar rules that the prosecution may not introduce evidence of criminal character or generally of the commission of a crime on one occasion to prove the commission of a crime on another."

The parallel here is that the effect of the evidence offered was to prove that the defendant was the sort of person who possessed cocaine by showing that she had a larger amount than the 11.9 grams charged and therefore was more likely than not to possess the 11.9 grams charged for purposes of distribution, so that the "familiar rules" mentioned above were violated to indicate she committed the crime charged. Thus, the purported evidence here tended to mislead the jury and served no purpose except to arouse the prejudice of the jury. C. J. S. Evidence, Sec. 159, p. 433. *A fortiori,* this was not merely inadmissible evidence as in *Ravich, supra,* but inadmissible evidence falsely identified.

As to the proffering of inadmissible evidence, reference is made to *United States* v. *Jones,* 374 F. 2d 414 (2nd Cir. 1967), wherein it was contended that a certain word had crept into the record thereby revealing the whole situation to the jury. The Circuit Court, in reviewing the prejudicial word which had entered in despite caution, stated at p. 419:

> "If this were important, we would be inclined to hold that this was insufficient to place the earlier crime before the jury, so that appellants were convicted because of it rather than the evidence of

> the instant offense. We need not, however, waste much time in speculating how much the jury did in fact divine, for the fact of the conviction was relevant and material."

Since this proffering of erroneous and inadmissible evidence served to indicate that the defendant possessed more than a mere 11.9 grams which, but for the technicality of blurred initials, would have been introduced, it thereby gave credence to the charge of possession of 11.9 grams of cocaine with intent to distribute and therefore was indeed "important". Moreover, in this case, more than a word or phrase was said to the jury, for the jury heard the agent erroneously identify the white powder as cocaine, the jury saw this inadmissible physical evidence in the courtroom while hearing the witness testify, "I initialed it up here but my signature is faded" as the reason for the failure of it going into evidence as cocaine, heard the prosecutor in summation state that "this bag of white powder" did not go into evidence because the signature was blurred and an agent would not lie, so that it was more than sufficient to place this white bag of powder falsely identified as cocaine before the jury. Therefore, it is submitted that the Second Circuit should have speculated on how much the jury did in fact divine, for the proffered testimony was false and extremely prejudicial. Their failure demonstrates the penchant of the Second Circuit to differ rather than to defer to the Supreme Court.

Here the government's case was indeed "bolstered" by this offer of inadmissible evidence. *United States* v. *Dutsch,* 357 F. 2d 331, 333 (4th Cir. 1966). The prejudicial effect of this inadmissible evidence is magnified by the shortness of the trial itself. *Southwestern Publishing Co.* v. *Horsey,* 230 F. 2d 319 (9th Cir. 1956). The court was incorrect in categorically holding that beyond a reasonable

doubt the error complained of did not contribute to the verdict attained. *Chapman* v. *California,* 386 U. S. 18, 24, 87 S. Ct. 824, 828. In short, this error had more than a mere "marginal prejudicial impact", it unequivocally prejudiced the defendant, *United States* v. *Semensohn,* 421 F. 2d 1206 at 1208 (2nd Cir. 1970), especially when there could not have been "appropriate instructions".

The Supreme Court stated in *Spencer* v. *Texas,* 87 S. Ct. 648, 385 U. S. 554, 563 (1967), "Cases in this court have long proceeded on the premise that the due process clause guarantees the fundamental element of fairness in a criminal trial". The prosecutor having a substance identified as cocaine which he knew was benzocaine and his compounding this again in his summation with the recurrent and multiple referral to a white bag of powder was indeed unfair and contrary to what is stated in *Berger* v. *United States,* 295 U. S. 78, 88 (1935), "It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." Here, then, there was, as proscribed in *Quiles* v. *United States,* 344 F. 2d 490 (9th Cir. 1965), an abuse of discretion by the prosecutor affecting the substantial rights of the defendant, because of the improper conduct of government counsel in raising "innuendoes" about more than the prosecutor could legally prove as to highly prejudicial subject matter. This, then, was not only negligence, it was culpable negligence showing a reckless disregard for the truth, especially when Hall's reliability was essential to the government's case. *Giglio* v. *United States, supra.*

Arguments on Question II:

Subsection (a) herein discusses a recurring question of critical importance in the administration of the criminal law as to the admission both quantitatively and qualita-

tively, of rebuttal testimony concerning collateral criminal conduct where probitive value is weighed against prejudicial effect. The Second Circuit, in this case, in affirming without opinion the admission of overwhelmingly prejudicial rebuttal testimony by the trial court, is in direct conflict with the Supreme Court in *Agnello* v. *United States,* 269 U. S. 20, 46 S. Ct. 4, and with other circuits, to wit, *California Insurance Co.* v. *Allen,* 235 F. 2d 178 (5th Cir. 1956), *Courtney* v. *United States,* 390 F. 2d 521 (9th Cir. 1968), *United States* v. *Winston,* 447 F. 2d 1236 (D. C. Cir. 1971), and in conflict with its own decision, *United States* v. *Apuzzo,* 245 F. 2d 416, 421 (2nd Cir. 1957). The affirmance herein was not only violation of the Sixth Amendment right to a fair trial, but since the rebuttal testimony in fact was premised upon the denial of a conversation that was overheard by the eavesdropping of an agent of the Federal Bureau of Narcotics, without the consent of either party and without a court order it also ignored the right to privacy of the Fourth Amendment, as is developed in subsection (b).

a) The rebuttal testimony, which was requested by the jury during deliberation to be read back to them, indicates "that there is a reasonable possibility that the evidence complained of might have contributed to the conviction", *Fahy* v. *Connecticut,* 375 U. S. 85, 86-87, 84 S. Ct. 229, 230 (1963), especially when *per se* it was grossly improper, extremely prejudicial, patently inflammatory and so far afield from the confines of the indictment that it denied the defendant a right to a fair trial on the issues, for the following separate and distinct reasons:

First: The government, not the defendant, "opened the door" to this prejudicial rebuttal testimony being permitted to ask the defendant on cross-examination over objection about the alleged South American cocaine-sugar scheme, never mentioned on the defendant's direct examination.

Thus, the "seeds sown on cross-examination were reaped in the testimony of the prosecution's rebuttal witness and the damage done to the defendant infinitely compounded." *United States* v. *Beno,* 324 F. 2d 582, 588 (2nd Cir. 1963). The court in *Beno* states at the same page that although "it is true . . . that where a defendant in his direct testimony falsely states a specific fact, the prosecutor will not be prevented from proving either through cross-examination or by calling its own witnesses that he lied as to that fact", the government cannot itself on cross-examination be the creator of the specific fact and then destroy their very creation. Moreover, the specific fact on defendant's direct testimony, as well as on cross-examination, was the defendant's denial of discussing cocaine with Bloom, which was offered by defendant to refute Agent Hall's direct testimony on the government's case as to what he illegally overheard through a door. To have permitted this rebuttal, the specific fact would have had to have been a discussion with Agent Hall, which was never the subject of defendant's direct testimony and was never raised by the prosecution on cross-examination. Nevertheless, through the device of improper cross-examination, Agent Hall was permitted in rebuttal to testify that the defendant told him about a South American sugar-cocaine swindle and he also volunteered details, a "federal fugitive", a "homosexual lover, a young boy", "smuggling" and an acknowledgment by the defendant that she believed that the reason for the agents arresting her was their belief that this alleged cocaine was in her apartment.

The government acknowledged that this rebuttal testimony would not have been admissible in its case in chief, a view apparently shared by the court (Tr. 339-340). In *Walder* v. *United States,* 347 U. S. 62, 74 S. Ct. 354 at 356 (1954), the court citing with approval *Agnello* v. *United States,* 269 U. S. 20, 46 S. Ct. 4, found it objectionable

with reference to evidence not admissible in the government's case in chief, that the government "tried to smuggle it in on cross examination by asking the accused the broad question, did you ever see narcotics before? After eliciting the expected denial it sought to introduce evidence of narcotics . . . in order to discredit the defendant." In the present case, the subterfuge was the broad question with reference to the South American scheme, on which the prosecutor anticipated a denial, so as to permit him to introduce the collateral evidence of the highly prejudicial cocaine-sugar swindle with all its lurid details. Therefore, "the questions were deliberately asked and the answers fully expected, the effect of which was to" permit the government to prejudice the appellant. *Courtney* v. *United States,* 390 F. 2d 521, 528 (9th Cir. 1968).

SECOND: But even presupposing that the defendant did open the door to the rebuttal testimony of Hall by her simple denial that she discussed cocaine that evening with Bloom the rule of *United States* v. *Winston,* 447 F. 2d 1236 at 1240 (D. C. 1971) applies:

> "Opening the door is one thing. But what comes through the door is another. Everything cannot come through the door. . . . Permission to explore in rebuttal with testimony not admissible on direct on the ground that the other party has opened the doors, rests 'upon the necessity of removing prejudice in the interest of fairness'. This doctrine is to prevent prejudice and not to be subverted into a rule for injection of prejudice. Introduction of otherwise inadmissible evidence under shield of this doctrine is permitted 'only to the extent necessary to remove any unfair prejudice which might otherwise have ensued from the original evidence'. California Ins. Co. v. Allen, 235 F. 2d 178, 180 (5th Cir. 1956)."

In the instant case, there in fact was no prejudice created by the defendant in denying on her direct testimony what a government agent had testified to on the government's case in chief, to wit, the mentioning of cocaine with Bloom. Thus, there was no necessity for a curative rebuttal in the interest of fairness. Moreover, there was the additional injection of prejudice by the prosecutor when the agent, in testifying to the alleged cocaine-sugar swindle, also mentioned "a federal fugitive" and a "homosexual lover, a young boy". The admission of this rebuttal testimony is diametrically opposed to the rule as to the extent of admissibility as is stated in *United States* v. *Beno*, 324 F. 2d 582 (2nd Cir. 1963), which clearly says that even though the defendant has offered irrelevant and incompetent evidence on a certain specific fact, the prosecutor is not immediately entitled to explore without restraint and at great length any specific occurrences which might tend to create an abhorrent image of the defendant.

> "For it makes little sense to insist that once incompetent evidence is erroneously admitted, the error must of necessity be compounded by opening the door so wide that rebutting collateral, inflammatory and highly prejudicial evidence may enter the minds of the jurors" at p. 588.

Here, then, even granted the admissibility of the alleged South American sugar-cocaine "swindle", the introduction of the above-mentioned lurid details was intended to create an abhorrent image that was prejudicial, unfair and inflammatory. Thus, the words of Judge Cardozo in *Shepard* v. *United States*, 290 U. S. 96 at p. 104 are uniquely meaningful: "The reverberating clang of these accusatory words would drown all weaker sounds. It is for ordinary minds that our rules of evidence are framed."

THIRD: By showing that Mrs. West had engaged in an alleged collateral swindle, "the prosecutor denied her the fair opportunity to defend against the particular crime charged", for the sort of evidence elicited here, a homosexual lover, a young boy, a federal fugitive, a cocaine-sugar swindle, "weigh too heavily with the jury and makes impossible the dispassionate approach necessary if justice is to be achieved". *United States* v. *Beno*, 324 F. 2d 582, 587 (2nd Cir. 1963). The defendant had a right to have guilt or innocence determined on the specific offense charged and not with the possibility of conviction because of an alleged collateral act. The force of this principle lies at the head of our criminal justice system and seems a vital part of our definition of due process of law. This right to be tried for a specific offense cannot be waived. *United States* v. *Beno, supra*, at p. 589. The evidence of another alleged crime should not have been permitted on the pretext of discrediting by contradiction, since as the court stated in *United States* v. *Kahaner*, 317 F. 2d 459 at 472 (2nd Cir. 1963), "The minute peg of relevancy will be entirely obscured by the dirty linen hung upon it." As the court stated in *United States* v. *Smith*, 283 F. 2d 760, 763 (2nd Cir. 1960),

> "It is inadmissible, however, because it unduly confuses the decision of the issue on which the case must finally turn, and makes it likely that the jury may substitute the general moral obliquity of the accused."

FOURTH: Here, unlike *United States* v. *Cuadrado*, 413 F. 2d 633, 635 (2nd Cir. 1969), the use of this testimony was not "limited by the court's instruction" either at the time the rebuttal testimony was let in or when the court gave its charge to the jury, for there was no caution that the testimony "cannot be considered in determining whether

the defendant is guilty but only as evidence bearing on defendant's credibility as a witness". In *Courtney* v. *United States,* 390 F. 2d 521 at 530 (9th Cir. 1968), the court states:

> "The danger is so strong that a jury will infer from unrelated criminal conduct that the defendant probably committed the offense charged or will condemn the defendant either for the unrelated conduct or simply because he is a bad person, regardless of his guilt or innocence of the offense charged, that admission of such material is treated as obviously prejudicial and admonitory instructions are commonly considered inefficacious. Cases cited."

A fortiori, in this case, without such instruction, the danger mentioned is insurmountable.

FIFTH: The scope of this rebuttal testimony was not permitted as evidence of prior similar criminal activity, bearing on an element of the crime charged as in *United States* v. *Knohl,* 379 F. 2d 427 (2nd Cir. 1967), but for the limited purposes of contradiction. Even if it were for the former purpose, it was agreed that it could not have been introduced in the case in chief. But this rebuttal testimony, ostensibly used for purposes of contradiction, actually developed into explicit and detailed testimony of an alleged prior criminal act, coupled with the aforementioned lurid details, and the prejudicial effect of this rebuttal testimony did in fact outweigh its probative value. *United States* v. *Cifarelli,* 401 F. 2d 512 (2nd Cir. 1968). This is especially significant when one considers that the defendant was charged with possession with intent to distribute a mere 11.9 grams of cocaine and this collateral, inflammatory and highly prejudicial rebuttal testimony, unrelated to the indictment, about the alleged sugar-cocaine swindle, was

allowed to buttress the plausibility of the charge in the indictment. That this rebuttal testimony was most significant to the jury is made clear by the very fact that they requested it be read back to them (Tr. 428, 430, 434).

Thus, in *United States* v. *Bozza,* 365 F. 2d 206, 213 (2nd Cir. 1966), the court in quoting McCormick said, "Evidence of another crime may be introduced if though only if it is substantially relevant for some other purpose than to create a probability", authorities cited, but here this evidence was in fact intended to show exactly a probability. That is why the prosecutor in summation said, "She was not only a dope peddler she was a swindler" (Tr. 400).

SIXTH: The rebuttal testimony by Agent Hall was *per se* improper simply because it did not rebut the defendant's testimony on direct examination that she did not discuss cocaine with Sheldon Bloom, or on cross-examination that she never discussed a South American scheme with Sheldon Bloom. The defendant was never asked on direct or cross-examination whether she had a discussion with Agent Hall about cocaine or concerning a South American scheme. This is totally dissimilar to *United States* v. *Hiss,* 185 F. 2d 822, 832 (2nd Cir. 1950), where Hiss testified on direct to a conversation with Dulles, who was later called on rebuttal to refute it. Likewise, it is unlike *United States* v. *Johnson,* 208 F. 2d 404, 406 (2nd Cir. 1953), where the rebuttal testimony was used to precisely and exactly contradict defendant's testimony as to identical points as well as the defense of entrapment. This, then, was out of the scope of proper rebuttal as were the questions by the prosecutor out of the scope of proper cross-examination.

SEVENTH: "Evidence of similar acts including other crimes is admissible for any relevant purpose other than to show defendant's bad character". *United States* v.

Johnson, 382 F. 2d 280 (2nd Cir. 1967). However, the introduction of this testimony interspersed with the gratuitous remarks of "homosexual lover, a young boy", "federal fugitive", "smuggling" and cocaine-sugar "swindle" was used "too clearly to show a proclivity to commit crime and thus blacken to her prejudice the character of the defendant who did not by testifying make that an issue to permit the erroneous admission of it to pass as harmless error." *United States* v. *James*, 208 F. 2d 124, 125 (2nd Cir. 1953). The rule is settled that unless and until the accused gives evidence of good character the prosecutor may not introduce evidence to the contrary. *Michelson* v. *United States*, 335 U. S. 469 (1948), 69 S. Ct. 213, 218. Thus, in *United States* v. *Tomaiolo*, 249 F. 2d 683, 689 (2nd Cir. 1957), the court stated that, "Although a prosecutor may bring in evidence as to truth and veracity of a defendant he is not at liberty to attack the general character unless character is in issue." But here, as stated on p. 690 of the *Tomaiolo* decision, the "court permitted the prosecutor to paint the defendant as a bad person associating with criminal companions who would do most anything." This indeed was an example of "overkill", for this testimony "overwhelmed" the case. *United States* v. *De Cicco*, 435 F. 2d 478, 484 (2nd Cir. 1970).

b) It was plain error affecting the substantial rights of the defendant for the trial court to have permitted this egregious development of the collateral rebuttal testimony, since the defendant's conversation with Bloom that night was behind the closed doors of her apartment, and neither the defendant nor Bloom gave their consent to have the conversation overheard and there was no court order for that purpose. Therefore, the defendant had a justifiable and constitutionally protected expectation that her conversation was private. It was based upon this violation of defendant's right to privacy that the agent was able to

testify that he overheard the word cocaine being mentioned several times in a conversation with Bloom. Thereafter, the defendant denied any such conversation with Bloom regarding cocaine and subsequently the highly prejudicial inflammatory rebuttal testimony of Agent Hall was allowed to be fully developed to the defendant's prejudice concerning the collateral South American cocaine swindle. That the defendant had a right to rely upon her conversation being private is evident from the long line of cases leading to *United States* v. *White*, 401 U. S. 745, 91 S. Ct. 1122 (1971).

Arguments on Question III:

The summation of the prosecutor manifestly violated defendant's right to a fair trial by exceeding the bounds of fair comment in making an inference not based on evidence and which was a statement of his own personal knowledge, namely, that a dead man who was an eye witness to the alleged charge in the indictment and the purported victim of the prejudicial rebuttal testimony as to an alleged cocaine swindle was referred to as one who "might have been a key government witness in the case".

Early in the trial the court, during the government's chief case, informed the jury, ". . . the person about whom you have heard, Mr. Sheldon Bloom, is dead and that the circumstances of his death have nothing to do with anybody involved in this case . . ." (Tr. 72). In summation, the defendant's attorney stated, "Bloom is dead. Why, we don't know" (Tr. 381). But the prosecutor, irrespective of the court's prior admonition to the jury, stated, "March 23rd Shelly Bloom dies. Shelly Bloom who might have been a key government witness in this case . . ." (Tr. 403). The court sustained an objection and cautioned the jury to "disregard that remark. They are not to speculate about what dead people might or might not have been" (Tr. 403). However, Mr. Justice Jackson said in *Krule-*

witch v. *United States,* 336 U. S. 440 at 453, 69 S. Ct. 716, "The naive assumption that prejudicial effects can be overcome by instruction to the jury . . . all practicing lawyers know to be unmitigated fiction." This statement uniquely applies to this case, since it caused the jury to be "led to believe that there is other evidence known to the prosecutor but not introduced justifying that belief". *Henderson* v. *United States,* 218 F. 2d 14, 19 (6th Cir. 1955).

Considering that Agent Hall had testified as to the collateral issue of the alleged South American swindle perpetrated upon the deceased Bloom by the defendant, and also that only Bloom was an eye witness as to the specific charge in the indictment, this remark by the prosecutor was so highly inflammatory that it had to prejudice the jury against the defendant, irrespective of any cautionary statement by the judge. For logic dictates that when the prosecutor said that Bloom "might have been the key government witness in this case", since only Bloom could have affirmed or denied the improperly introduced rebuttal South American swindle and since only Bloom could have affirmed or denied the specific charge against the defendant, the government, by pronouncing that Bloom might have been their key witness, clearly indicated that he would have affirmed the rebuttal swindle and the specific crime charged. This two-pronged implication was made manifest when the prosecutor, in summation, further stated, "She was not only a dope peddler she was a swindler" (Tr. 490).

This "seriously affected the fairness, integrity or public reputation of judicial proceedings", *United States* v. *Atkinson,* 297 U. S. 157, 160, 56 S. Ct. 391, 392. These were not casual and isolated statements in a long summation of a long trial but instead were calculated and connected statements in a short summation of a short trial. *United States* v. *Socony Vacuum Oil Co.,* 310 U. S. 150, 242, 60 S. Ct. 811, 853.

The comment that "Bloom might have been a key witness for the government" was an inference which the prosecutor obviously had no authority to draw from any of the evidence before the jury. *United States* v. *De Fillo*, 257 F. 2d 835 (2nd Cir. 1958) at 840. The comment by the prosecutor was indeed unfair, *United States* v. *Hysohion*, 439 F. 2d 274 at 277 (2nd Cir. 1971), especially since his statement obviously could come only from his own personal knowledge. *United States* v. *Gruenberger*, 431 F. 2d 1063 at 1068 (2nd Cir. 1970). For "it is well settled that the jury's consideration in a case should be limited to those matters actually brought out in evidence and that summation should not be used to put before the jury facts not actually presented in evidence". *United States* v. *Spangelet*, 258 F. 2d 338, 342 (2nd Cir. 1958). The special importance of this doctrine in criminal trials is obvious, since the prosecutor represents "a sovereignty whose obligation is to govern impartially". *Berger* v. *United States*, 295 U. S. 78, 88. For as *Berger* suggests, this obligation may cause a jury to place more confidence in the word of a United States Attorney than in that of an ordinary member of the bar.

CONCLUSION

For all of the foregoing, it is respectfully submitted that in the interests of a right to a fair trial under the Sixth Amendment and the overriding issues presented here including the right to privacy under the Fourth Amendment, this Petition for Writ of Certiorari should be granted, especially since the affirmance below is palpably erroneous and patently untenable.

Respectfully submitted,

PAUL P. RAO, JR.,
Attorney for Petitioner.

APPENDIX

Amendment IV—Searches and Seizures

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment VI: Jury trial for crimes, and procedural rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

Title 21, U. S. Code

§812. Schedules of controlled substances—Establishment

(a) There are established five schedules of controlled substances, to be known as schedules I, II, III, IV, and V. Such schedules shall initially consist of the substances listed in this section. The schedules established by this section shall be updated and republished on a semi-annual basis during the two-year period beginning one year after the date of enactment of this subchapter and shall be updated and republished on an annual basis thereafter.

PLACEMENT ON SCHEDULES; FINDINGS REQUIRED

(b) Except where control is required by United States obligations under an international treaty, convention, or protocol, in effect on the effective date of this part, and except in the case of an immediate precursor, a drug or other substance may not be placed in any schedule unless the findings required for such schedule are made with respect to such drug or other substance. The findings required for each of the schedules are as follows:

(1) Schedule I.—

(A) The drug or other substance has a high potential for abuse.

(B) The drug or other substance has no currently accepted medical use in treatment in the United States.

(C) There is a lack of accepted safety for use of the drug or other substance under medical supervision.

(2) Schedule II.—

(A) The drug or other substance has a high potential for abuse.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States or a currently accepted medical use with severe restrictions.

(C) Abuse of the drug or other substances may lead to severe psychological or physical dependence.

(3) Schedule III.—

(A) The drug or other substance has a potential for abuse less than the drugs or other substances in schedules I and II.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States.

(C) Abuse of the drug or other substance may lead to moderate or low physical dependence or high psychological dependence.

(4) Schedule IV.—

(A) The drug or other substance has a low potential for abuse relative to the drugs or other substances in schedule III.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States.

(C) Abuse of the drug or other substance may lead to limited physical dependence or psychological dependence relative to the drugs or other substances in schedule III.

(5) Schedule V.—

(A) The drug or other substance has a low potential for abuse relative to the drugs or other substances in schedule IV.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States.

(C) Abuse of the drug or other substance may lead to limited physical dependence or psychological dependence relative to the drugs or other substances in schedule IV.

INITIAL SCHEDULES OF CONTROLLED SUBSTANCES

(c) Schedules I, II, III, IV, and V shall, unless and until amended pursuant to section 811 of this title, consist of the following drugs or other substances, by whatever official name, common or usual name, chemical name, or brand name designated:

SCHEDULE I

(a) Unless specifically excepted or unless listed in another schedule, any of the following opiates, including their isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, whenever the existence of such isomers, esters, ethers, and salts is possible within the specific chemical designation:

(1) Acetylmethadol.
(2) Allylprodine.
(3) Alphacetylmathadol.
(4) Alphameprodine.
(5) Alphamethadol.
(6) Benzethidine.
(7) Betacetylmethadol.
(8) Betameprodine.

(9) Betamethadol.
(10) Betaprodine.
(11) Clonitazene.
(12) Dextromoramide.
(13) Dextrorphan.
(14) Diampromide.
(15) Diethylthiambutene.
(16) Dimenoxadol.
(17) Dimepheptanol.
(18) Dimethylthiambutene.
(19) Dioxaphetyl butyrate.
(20) Dipipanone.
(21) Ethylmethylthiambutene.
(22) Etonitazene.
(23) Etoxeridine.
(24) Furethidine.
(25) Hydroxypethidine.
(26) Ketobemidone.
(27) Levomoramide.
(28) Levophenacylmorphan.
(29) Morpheridine.
(30) Noracymethadol.
(31) Norlevorphanol.
(32) Normethadone.
(33) Norpipanone.
(34) Phenadoxone.
(35) Phenampromide.
(36) Phenomorphan.
(37) Phenoperidine.
(38) Piritramide.
(39) Proheptazine.
(40) Properidine.
(41) Racemoramide.
(42) Trimeperidine.

(b) Unless specifically excepted or unless listed in another schedule, any of the following opium derivatives, their salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) Acetorphine.
(2) Acetyldihydrocodeine.
(3) Benzylmorphine.
(4) Codeine methylbromide.
(5) Codeine-N-Oxide.
(6) Cyprenorphine.
(7) Desomorphine.
(8) Dihydromorphine.
(9) Etorphine.
(10) Heroin.
(11) Hydromorphinol.
(12) Methyldesorphine.
(13) Methylhydromorphine.
(14) Morphine methylbromide.
(15) Morphine methylsulfonate.
(16) Morphine-N-Oxide.
(17) Myrophine.
(18) Nicocodeine.
(19) Nicomorphine.
(20) Normorphine.
(21) Pholcodine.
(22) Thebacon.

(c) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation, which contains any quantity of the following hallucinogenic substances, or which contains any of their salts, isomers, and salts of isomers whenever the existence of such salts,

isomers, and salts of isomers is possible within the specific chemical designation:

(1) 3,4-methylenedioxy amphetamine.
(2) 5-methoxy-3,4-methylenedioxy amphetamine.
(3) 3,4,5-trimethoxy amphetamine.
(4) Bufotenine.
(5) Diethyltryptamine.
(6) Dimethyltryptamine.
(7) 4-methyl-2,5-dimethoxyamphetamine.
(8) Ibogaine.
(9) Lysergic acid diethylamide.
(10) Marihuana.
(11) Mescaline.
(12) Peyote.
(13) N-ethyl-3-piperidyl benzilate.
(14) N-methyl-3-piperidyl benzilate.
(15) Psilocybin.
(16) Psilocyn.
(7) Tetrahydrocannabinols.

SCHEDULE II

(a) Unless specifically excepted or unless listed in another schedule, any of the following substances whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

(1) Opium and opiate, and any salt, compound, derivative, or preparation of opium or opiate.

(2) Any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of the substances referred to in clause (1), except that these substances shall not include the isoquinoline alkaloids of opium.

(3) Opium poppy and poppy straw.

(4) Coca leaves and any salt, compound, derivative, or preparation of coca leaves, and any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances, except that the substances shall not include decocainized coca leaves or extraction of coca leaves, which extractions do not contain cocaine or ecgonine.

(b) Unless specifically excepted or unless listed in another schedule, any of the following opiates, including their isomers, esters, ethers, salts, and salts of isomers, esters and ethers, whenever the existence of such isomers, esters, ethers, and salts is possible within the specific chemical designation:

(1) Alphaprodine.
(2) Anileridine.
(3) Bezitramide.
(4) Dihydrocodeine.
(5) Diphenoxylate.
(6) Fentanyl.
(7) Isomethadone.
(8) Levomethorphan.
(9) Levorphanol.
(10) Metazocine.
(11) Methadone.
(12) Methadone-Intermediate, 4-cyano-2-dimethylamino-4, 4-diphenyl butane.
(13) Moramide-Intermediate, 2-methyl-3-morpholino-1, 1-diphenylpropane-carboxylic acid.
(14) Pethidine.
(15) Pethidine-Intermediate-A, 4-cyano-1-methyl-4-phenylpiperidine.

(16) Pethidine-Intermediate-B, ethyl-4-phenylpiperidine-4-carboxylate.

(17) Pethidne-Intermediate-C, 1-methyl-4-phenylpiperidine-4-carboxylic acid.

(18) Phenazocine.

(19) Piminodine.

(20) Racemethorphan.

(21) Racemorphan

(c) Unless specifically excepted or unless listed in another schedule, any injectable liquid which contains any quantity of methamphetamine, including its salts, isomers, and salts of isomers.

SCHEDULE III

(a) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the central nervous system:

(1) Amphetamine, its salts, optical isomers, and salts of its optical isomers.

(2) Phenmetrazine and its salts.

(3) Any substance (except an injectable liquid) which contains any quantity of methamphetamine, including its salts, isomers, and salts of isomers.

(4) Methylphenidate.

(b) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a depressant effect on the central nervous system:

(1) Any substance which contains any quantity of a derivative of barbituric acid, or any salt of a derivative of barbituric acid.

(2) Chorhexadol.
(3) Glutethimide.
(4) Lysergic acid.
(5) Lysergic acid amide.
(6) Methyprylon.
(7) Phencyclidine.
(8) Sulfondiethylmethane.
(9) Sulfonethylmethane.
(10) Sulfonmethane.

(c) Nalorphine.

(d) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation containing limited quantities of any of the following narcotic drugs, or any salts thereof:

(1) Not more than 1.8 grams of codeine per 100 milliliters or not more than 90 milligrams per dosage unit, with an equal or greater quantity of an isoquinoline alkaloid of opium.

(2) Not more than 1.8 grams of codeine per 100 milliliters or not more than 90 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

(3) Not more than 300 milligrams of dihydrocodeinone per 100 milliliters or not more than 15 milligrams per dosage unit, with a fourfold or greater quantity of an isoquinoline alkaloid of opium.

(4) Not more than 300 milligrams of dihydrocodeinone per 100 milliliters or not more than 15 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

(5) Not more than 1.8 grams of dihydrocodeine per 100 milliliters or not more than 90 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

(6) Not more than 300 milligrams of ethylmorphine per 100 milliliters or not more than 15 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

(7) Not more than 500 milligrams of opium per 100 milliliters or per 100 grams, or not more than 25 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

(8) Not more than 50 milligrams of morphine per 100 milliliters or per 100 grams with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

SCHEDULE IV

(1) Barbital.
(2) Chloral betaine.
(3) Chloral hydrate.
(4) Ethchlorvynol.
(5) Ethinamate.
(6) Methohexital.
(7) Meprobamate.
(8) Methylphenobarbital.
(9) Paraldehyde.
(10) Petrichloral.
(11) Phenobarbital.

SCHEDULE V

Any compound, mixture, or preparation containing any of the following limited quantities of narcotic drugs, which

shall include one or more nonnarcotic active medicinal ingredients in sufficient proportion to confer upon the compound, mixture, or preparation valuable medicinal qualities other than those possessed by the narcotic drug alone:

(1) Not more than 200 milligrams of codeine per 100 milliliters or per 100 grams.

(2) Not more than 100 milligrams of dihydrocodeine per 100 milliliters or per 100 grams.

(3) Not more than 100 milligrams of ethylmorphine per 100 milliliters or per 100 grams.

(4) Not more than 2.5 milligrams of diphenoxylate and not less than 25 micrograms of atropine sulfate per dosage unit.

(5) Not more than 100 milligrams of opium per 100 milliliters or per 100 grams.

STIMULANTS OR DEPRESSANTS CONTAINING ACTIVE MEDICINAL INGREDIENTS; EXCEPTION

(d) The Attorney General may by regulation except any compound, mixture, or preparation containing any depressant or stimulant substance in paragraph (a) or (b) of schedule III or in schedule IV or V from the application of all or any part of this subchapter if (1) the compound, mixture, or preparation contains one or more active medicinal ingredients not having a depressant or stimulant effect on the central nervous system, and (2) such ingredients are included therein in such combinations, quantity, proportion, or concentration as to vitiate the potential for abuse of the substances which do have a depressant or stimulant effect on the central nervous system.

Pub. L. 91-513, Title II, §202, Oct. 27, 1970, 84 Stat. 1247.

§841. Prohibited acts A—Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

• • •

PENALTIES

(b) Except as otherwise provided in section 845 of this title any person who violates subsection (a) of this section shall be sentenced as follows:

(1) (A) In the case of a controlled substance in schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $25,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provison of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than $50,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment.

• • •

Rule 52: Harmless Error and Plain Error

• • •

(b) *Plain Error.* Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
SEP 24 1973
MICHAEL RODAK, JR., CLERK

No. 73-179

In the Supreme Court of the United States

OCTOBER TERM, 1973

ESTYNE WEST, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C., 20530.

INDEX

Cases: Page

Chapman v. *California*, 386 U.S. 18 4
Gaither v. *United States*, 413 F. 2d 1061 10
Segurola v. *United States*, 275 U.S. 8
Sullivan v. *United States*, 411 F. 2d 556 8
United States v. *Beno*, 324 F. 2d 582 8
United States v. *Cuadrado*, 413 F. 2d 633 9
United States v. *Hiss*, 185 F. 2d 822, certiorari denied, 340 U.S. 948 8
United States v. *Johnson*, 208 F. 2d 404, certiorari denied, 347 U.S. 928 8
United States v. *Keilly*, 445 F. 2d 1285, certiorari denied, 406 U.S. 962 9
United States v. *Ramos*, 268 F. 2d 878 10
United States v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 10
United States v. *Tortora*, 464 F. 2d 1202 10
United States v. *White*, 401 U.S. 745 8
Walder v. *United States*, 347 U.S. 62 8

Statutes:

21 U.S.C. 812 2
21 U.S.C. 841(a)(1) 2
21 U.S.C. 841(b)(1)(A) 2

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-179

ESTYNE WEST, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends (1) that certain evidence, although promptly stricken by the court, irretrievably prejudiced her, (2) that parts of a conversation in which she engaged, overheard by a narcotics agent, should not have been admitted in evidence, (3) that evidence admitted on rebuttal was prejudicial, and (4) that improper arguments were made in the government's summation.

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of possessing with intent to distribute 11.9 grams of cocaine, in violation of 21 U.S.C.

812, 841(a)(1) and 841(b)(1)(A). She was sentenced to imprisonment for one year, to be followed by a special parole term of three years. The court of appeals affirmed *per curiam*.

On March 6, 1972, at about 8:00 p.m., narcotics agents went to petitioner's Manhattan apartment to execute a search warrant. One of the agents knocked and asked for "Joel", the name of petitioner's husband. A voice answered, "I don't know any Joel." Some conversation inside the apartment was heard (Tr. 25–26, 88–90). In order to avoid a forced entry, the agents awaited the departure of the male guest (one Sheldon Bloom). During the wait, Agent Hall listened to the conversation between petitioner and Bloom. He heard "cocaine" mentioned several times (Tr. 24–29, 87–88, 157–157A). After several hours' wait, during which Bloom failed to leave, a ladder was obtained from a neighboring fire station and thrown up against the house, and two agents entered through a dining room window (Tr. 120–122, 158, 201–202). Petitioner was seen to throw an object out of another window. She then said to her guest, "they can't do anything to us now." The object was a glass, which shattered when it struck the ground. It held a plastic envelope containing what proved to be 11.9 grams of nearly pure cocaine (Tr. 122–123, 160–161, 202). Petitioner and Bloom, now deceased, were placed under arrest. Execution of the search warrant turned up a quantity of benzocaine, a non-prohibited substance used in diluting cocaine for the retail market (Tr. 32, 35, 73–79, 101, 123,

162–163). Petitioner stated that she did not use drugs (Tr. 37, 70, 270–271, 341).

1. Petitioner places particular stress upon the claim that she was prejudiced by the following occurrence during direct examination of Agent Hall regarding the dilutant found incident to the search warrant (Tr. 78–79):

> Q. Mr. Hall, I show you Government's Exhibits 3–A, 3–B and 3–C for identification and ask you whether you can identify them?
>
> A. Yes, Sir, I can. Exhibit 3–A is the lock-sealed evidence envelope in which the cocaine, Exhibit 3–C was submitted to the Bureau of Narcotics and Dangerous Drugs' Chemist and the reason I know this—
>
> Miss GERLING: I object to the testimony of cocaine unless the witness is qualified as an expert.
>
> Mr. FELD: Your Honor——
>
> The COURT: Well, at this time I will strike out the description of that substance and, of course, if the Government is not able to eventually adduce any evidence that indicates something or other about that description, that will end the case. But we will strike it out now and the jury will disregard it.
>
> Mr. FELD: The Government is not claiming——
>
> The COURT: I don't care what you are claiming. I am striking that testimony.

There is no merit to the petitioner's contention that she was denied a fair trial because Agent Hall accidentally and inaccurately referred to Exhibit 3-C as cocaine, when in fact it was benzocaine. When this statement was made, defense counsel objected, the

testimony was immediately stricken, and the district court promptly instructed the jury to disregard it (Tr. 79). Under these circumstances, no prejudice could have resulted from this testimony, and the error was unquestionably harmless. *Chapman* v. *California*, 386 U.S. 18, 24.[1]

Immediately following the district court's instruction to strike the description of the exhibit, Agent Hall was asked whether he could identify the exhibit. He candidly stated, "I initialed it up here but it is faded" (Tr. 79). As a result, the Government did not offer this exhibit, which contained approximately 44 grams of benzocaine seized in the defendant's apartment, because Hall's inability to identify his initials on the exhibit [1a] precluded establishing the necessary chain of custody.[2]

---

[1] Petitioner's counsel made no effort by her interrogation of the witness or by a stipulation to correct the misstatement. (The prosecutor was obviously attempting to correct the error, but was interrupted by the district judge.)

[1a] Petitioner chooses to attack Hall's credibility here, as she did below, by emphasizing that the laboratory report relating to Exhibit 3-C mentions that the exhibit was initialed by Agent Diez and witnessed by Agent Shay (Pet. 11). The argument is frivolous. First, the laboratory report specifically mentions that this evidence was seized by Agent Hall. The agent who seizes the evidence customarily initials it. Second, petitioner ignores the fact that Hall identified his initials on the two plastic bags containing 437.30 grams of benzocaine (GX 1-C, 1-D), which he also seized at the defendant's apartment and which were admitted into evidence (Tr. 74). The laboratory report concerning these exhibits makes no reference to his initials being on them. In sum, the laboratory report does not purport to contain an exhaustive list of the persons whose initials appear on the evidence and does not serve to refute Hall's testimony.

[2] Had the chain of custody been established, the benzocaine

Petitioner also argues that the prosecutor improperly conveyed the impression to the jury that the exhibit (GX 3–C) was cocaine (Pet. 13). The sole asserted basis for this speculative allegation is petitioner's strained interpretation of a statement from the summation:

> Is Agent Hall a liar? * * * Do you remember when he was on the witness stand I had a bag of white powder and I asked him to take a look at the bag of white power and see if he could identify it.
>
> He was looking at the bag of powder looking for his initials on it. He said I think these are my initials but they are blurred and I can't say whether they are or not. The government didn't offer that bag of white powder. He could have said, sure, these are my initials, they are blurred and I can identify it and get it into evidence, but he didn't do that. [Tr. 404–405.]

The challenged argument was wholly proper, as the district court recognized when it overruled the objection to it (Tr. 405).

First, the government had no reason to suggest to the jury that there was more cocaine involved in this case than the 11.9 grams charged in the indictment, and petitioner's assertions to the contrary are completely unsupported by the record. Indeed, at the outset of his summation, the prosecutor emphasized that the case was "not about a lot of cocaine" and unequivocally told the jury: "The ultimate issue in this case

---

and boric acid (GX 3-C), admittedly a diluting agent for cocaine, would have been admissible on the issue of whether the defendant intended to distribute the 11.9 grams of cocaine.

is a very simple one: did the defendant possess this cocaine [GX 4–C] with intent to distribute it?" (Tr. 398).

Second, it is perfectly clear that the challenged statement, when examined in context, was wholly proper. In her summation, defense counsel had repeatedly charged that the government's witnesses, especially Agent Hall, had lied and had fabricated the evidence upon which the government's case was based (Tr. 375, 380, 382, 386, 389–390). In the face of petitioner's claim that Agent Hall had testified falsely, it was certainly appropriate for the government to remind the jury of Hall's candor and truthfulness in testimony about the blurred initials on GX 3-C.

2. Petitioner urges that the trial court erred in receiving Agent Hall's rebuttal testimony with respect to petitioner's statements regarding the true nature of her conversation with Sheldon Bloom on the night of their arrest. This claim is without merit.

Contrary to petitioner's claim, the subject of the explanation for the petitioner's meeting with Bloom on the night in question was first injected into the case on the defendant's direct examination, when she affirmatively stated that he was present at her apartment to discuss her African opera venture.[3]

---

[3] The relevant testimony was as follows:

"Q. Did you have an appointment that night to meet somebody. A. Yes, I did.

"Q. Who did you have an appointment to meet? A. Shelly Blume [sic].

"Q. What did you have any [sic] appointment to meet him in regard to? A. The Lost Fisherman Opera. I had a can of film there that I spent my money on and I also had a sound

Furthermore, she denied on direct examination that any of their discussion concerned cocaine and claimed that the word cocaine was never mentioned (Tr. 314–315).[4]

Agent Hall's rebuttal testimony was introduced to refute petitioner's testimony about her reason for meeting with Bloom. When defense counsel objected, the district court ruled: "This seems to me to be entirely valid testimony, discrediting, if it is believed by the jury, her story of what she and Mr. Bloom were discussing * * *" (Tr. 352–353).

The law is well established that rebuttal evidence may be introduced to refute evidence on material issues of fact, whether elicited on direct or cross-examination, as well as to refute evidence on collateral issues of fact elicited on direct examination. *Walder* v. *United States,* 347 U.S. 62, 65; *United States* v. *Hiss,* 185 F. 2d 822, 832 (C.A. 2), certiorari denied, 340 U.S. 948; *United States* v. *Johnson,* 208 F. 2d 404, 406 (C.A. 2), certiorari denied, 347 U.S. 928; *Sullivan* v. *United States,* 411 F. 2d 556, 558 (C.A. 10).[5]

---

track and they weren't synchronized. I was trying to talk him into synchronizing it and to raise the money to bring it over.

"Q. You had to have money, in other words, to raise finances? A. Yes, because he had access to machinery amongst other things—" (Tr. 313).

[4] On cross-examination, the defendant elaborated in detail the alleged discussion with Bloom concerning the African opera company venture (Tr. 335–336). When asked about the purpose of the meeting, she stated: "For me, to get some money from Mr. Shelly Bloom for this project. That was the purpose" (Tr. 337). She reiterated her denial that the word cocaine was mentioned during the conversation (Tr. 337).

[5] Petitioner alleges for the first time in her petition for certiorari that her conversation with Bloom—which Hall related

The rebuttal testimony here is distinguishable from the situation in *United States* v. *Beno*, 324 F.2d 582 (C.A. 2), upon which petitioner heavily relies. In *Beno*, a prosecution against an Internal Revenue Agent for having solicited and received an encyclopedia and dictionary in violation of 18 U.S.C. 202, the court of appeals reversed the conviction because the trial court had admitted voluminous testimony on a host of specific, collateral acts of the defendant, including the preparation of tax returns in violation of IRS rules, an arrest for reckless driving, and threats by the defendant to investigate the tax records of the police. By contrast, the rebuttal in this case was limited to discrediting the petitioner's false testimony on direct examination with respect to facts directly involved in the events out of which this indictment arose. See *United States* v. *Cuadrado*, 413 F.2d 633, 635 (C.A. 2); *United States* v. *Keilly*, 445 F.2d 1285, 1289 (C.A. 2), certiorari denied, 406 U.S. 962.[6]

---

on rebuttal—was improperly overheard by him in the hallway. She alleges "a justifiable and constitutionally protected expectation that her conversation was private" (Pet. 25). This claim is frivolous. Petitioner had no expectation that a conversation which was loud enough to be overheard in the hallway was "private". The rationale of *United States* v. *White*, 401 U.S. 745, upon which petitioner relies, clearly sustains the admissibility of this evidence. In any event, since petitioner did not raise this issue below, she may not raise the issue here. *Segurola* v. *United States*, 275 U.S. 106, 111–112.

[6] It is true, as petitioner asserts, that no instruction was given to the jury concerning the rebuttal testimony at the time it was introduced. No such instruction, however, was requested, nor did the defense object to the charge on this ground. The absence of such an instruction under these circumstances does not warrant reversal.

3. During summation, the prosecutor stated: "March 23rd Shelly Bloom dies. Shelly Bloom who might have been a key government witness in this case * * * " (Tr. 403). Defense counsel immediately objected. Judge Frankel sustained the objection and instructed the jury to disregard this remark, stating:

> * * * I definitely sustain your objection. The jury will disregard that remark. They are not to speculate about what dead people might or might not have been [Tr. 403].

Petitioner contends that the remark concerning Bloom requires reversal of her conviction, notwithstanding the trial judge's ruling striking the remark and the prompt cautionary instruction to the jury, because the evidence against the defendant was allegedly tenuous.[7] This argument is without merit.

The evidence against petitioner was in fact compelling. The proof showed that petitioner had thrown an object out of her window which held a plastic bag containing 11.9 grams of almost pure cocaine. The cocaine, if diluted, had a retail value of $2,000 (Tr. 81). A search of petitioner's apartment revealed large quantities of benzocaine, which she admitted were "cutting materials." Before and during the trial, she denied that she was a user of cocaine. Following her arrest, petitioner admitted that it was she who had thrown the cocaine out of the window. Moreover, petitioner's false

[7] In her motion for a new trial, petitioner challenged the remark concerning Bloom on the ground that the jury might have attributed his death to the petitioner. This ground of attack appears to have been abandoned on appeal because of its obviously frivolous nature.

exculpatory statement that it was Bloom who had thrown the cocaine was further evidence of guilt.[8]

Even assuming that the remark concerning Bloom was ill-advised, it was a single, isolated utterance during the government's summation. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 242; *United States* v. *Tortora*, 464 F. 2d 1202, 1207 (C.A. 2); *United States* v. *Ramos*, 268 F. 2d 878, 880 (C.A. 2). Any possible prejudice which might have accrued from this remark was largely countered by the steps taken: objection was promptly made, and the jury was immediately instructed to disregard the remark. See *Gaither* v. *United States*, 413 F. 2d 1061, 1080 (C.A.D.C.).

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1973.

---

[8] Although petitioner alleges that the proof against her was "tenuous," she does not challenge the sufficiency of the evidence to support the verdict. The verdict was amply sustained by the evidence, as the trial judge ruled in denying petitioner's motion for a new trial (Tr. 21–23, February 26, 1973).

U.S. GOVERNMENT PRINTING OFFICE: 1973